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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,

Appellant,

vs.

J. ALICE STELLING,

Appellee.

JURISDICTIONAL STATEMENT.

Statement of the Case.

Appellant, as assignee of appellee's promissory note secured by a deed of trust on real property in California, brought this action on the note in the Superior Court for Santa Clara County for a balance alleged to be due thereon after default and a sale of the property constituting the security. The note and deed of trust were executed July 7, 1934. The note was for $45,925, payable one year from date "in lawful money of the United States of America." The complaint alleged that the security for the note was duly sold on January 8, 1938; that the net proceeds of the sale were applied on the note; that after the proceeds were so applied there remained, and still remains, due a balance of $13,164.13, for which judgment was sought.

Defendant demurred on the ground, among others, that the complaint failed to allege that the property was sold

for its fair market value as of the day of sale, or what such fair market value was on that date, as required by Section 580a of the Code of Civil Procedure of California, enacted in 1933, said statute providing that the excess of such valuation over the actual sale figure must be applied as a payment on the balance due on the note. Appellant resisted the demurrer on the ground that Section 580a is invalid because repugnant to the provisions of the Federal Constitution and statutes hereinafter set forth. The trial court sustained the validity of Section 580a, sustained the demurrer without leave to amend, and entered judgment in favor of appellee.

Appellant appealed. The District Court of Appeal affirmed the judgment, expressly sustaining the validity of Section 580a prospectively as against appellant's contention that the statute is invalid under the Federal Constitution and statutes. Section 580a has uniformly been held void retroactively, the said court correctly stated, as being an impairment of contract. The contract clause is not pertinent to the instant suit and was not raised. The Supreme Court of California denied a hearing.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. A. 344 (a), 861a).

Statute of the State Involved.

The statute, the validity of which is involved, is Section 580a of the Code of Civil Procedure of the State of California (Statutes of California, 1933, Chap. 642, p. 1672,) the pertinent portion of which reads:

> "Whenever a money judgment is sought for the balance due upon an obligation for the payment of which

a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his complaint the entire amount of the indebtedness which was secured by said deed of trust or mortgage at the time of sale, the amount for which such real property or interest therein was sold and the fair market value thereof at the date of sale and the date of such sale. Upon the application of either party made at least ten days before the time of trial the court shall, and upon its own motion the court at any time may, appoint one of the inheritance tax appraisers provided for by law to appraise the property or the interest therein sold as of the time of sale. Such appraiser shall file his appraisal with the clerk and the same shall be admissible in evidence. Such appraiser shall take and subscribe an oath to be attached to the appraisal that he has truly, honestly and impartially appraised the property to the best of his knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation of such appraiser, not to exceed five dollars per day, and expenses for the time actually engaged in such appraisal, which may be taxed and allowed in like manner as other costs. Before rendering any judgment the court shall find the fair market value of the real property, or interest therein sold, at the time of sale. The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale; provided, however, that in no event shall the amount of said judgment, exclusive of interest after the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said deed of trust or mortgage."

Date of Judgment and of Application for Appeal.

The judgment of the District Court of Appeal was made and entered January 23, 1940. The Supreme Court of the State of California denied a petition for a hearing on March 21, 1940. The decision and judgment of the District Court of Appeal became final on March 23, 1940.

People v. *Walker*, 76 Cal. App. 192;
People v. *District Court of Appeal*, 193 Cal. 19.

The application for appeal was presented and the appeal allowed on June 13, 1940.

The decision of the District Court of Appeal is not yet officially reported; it is unofficially reported in 100 Cal. App. Dec. 335, 98 Pac. (2d) 566.

Cases Believed to Sustain Jurisdiction.

The cases believed to sustain the jurisdiction of this court are:

Eigner v. *Texas* (No. 635, October Term, 1939, decided May 6, 1940), 84 L. Ed. Adv. Ops. 756;
Colorado National Bank v. *Bedford* (No. 719, October Term, 1939, decided April 22, 1940), 84 L. Ed. Adv. Ops. 730, 732.

Raising the Federal Questions.

In the trial court, the plaintiff raised the point that the statute is repugnant to the Federal Constitution. This is shown by a Stipulation which was filed during consideration of the demurrer and before it was decided and judgment entered, and which appears in the Transcript on Appeal from the trial court to the Appellate Court, reading in part:

"*Stipulation.*

A Demurrer to the Amended Complaint having been heretofore filed, argued, and submitted, one of the

grounds of said Demurrer being that the Complaint does not comply with the requirements of Section 580a C. C. P., and the Plaintiff having argued that said Section 580a is unconstitutional as being in violation of Article I, Section 10 of the Constitution of the United States, providing that no state shall make anything but gold and silver coin a tender in the payment of debts, * * * and it being the intent of both parties to appeal in the event the decision of this Court is against him or her and to test solely the constitutionality of said Section 580a upon said appeal the Defendant waives the other grounds of demurrer and in consideration of said waiver the Plaintiff states to the Defendant and to the Court that he is willing to stand upon the Complaint and does not desire to further Amend said Complaint.

It is agreed that this Stipulation may be made a part of the Court's Order sustaining or overruling said Demurrer."

In the California District Court of Appeal, the appellant raised the Federal questions in briefs:

The Tender Clause.

Opening Brief, p. 11

"Madison, in 'The Federalist', No. 44, said:

'The *power* to make anything but gold and silver a *tender in payment of debts*, is withdrawn from the states on *the same principle* with that of issuing *paper currency.*'"

Oral Argument of C. H. White, filed on November 3, 1939, as a brief, pp. 9 and 10:

"First, then, let us test 580a by the Constitution itself, by the plain wording and meaning of the constitutional clause. It provides that nothing but gold and silver coin may by state statute be made a tender or

medium for paying a debt. All Justices and eminent counsel in *Ogden v. Saunders* agreed that this clause meant, as Marshall expressed it (12 Wheat., at p. 336) a prohibition against 'making property a tender in payment of debts.' And as Marshall there said, and all agreed, the clause *'unquestionably'* makes such a law void of *prospective* force. Now, 580a provides that the money borrowed may be paid by the money bid and accepted at the trustee's sale, *or* the valuation *figure*, whichever is higher. Is this excess of the valuation figure over the sale figure, this excess which is to pay the debt *pro tanto*, gold or silver coin? Is it national metallic money? No one would so contend. Is 580a any less a tender law because it makes the *valuation figure of the property owned by a third party purchaser* at the trustee's sale a substitute for legal tender in paying the debt? On the contrary, that makes it a tender law of the most vicious kind."

The final decision herein discusses at length the question as to whether or not the statute is repugnant to the said tender clause, stating the point was raised by appellant in his briefs in said court.

The Coinage Clause and the Federal Statutes enacted pursuant thereto.

Appellant's Opening Brief, p. 40:

"*Ogden v. Saunders*, 12 Wheat. 265 (Justice Washington):

'• • • It declares, that "No state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts". These prohibitions associated with the powers granted to Congress "to coin money, and to regulate the value thereof, and of foreign coin", most obviously constitute members of the same family, being upon the same subject, and governed by the same policy.' "

Reply Brief, 8 and 9:

> " 'United States notes shall be *lawful money, and a legal tender in payment of all debts,* public and *private, within the United States,* except for duties on imports and interest on the public debt.' (R. S. par. 3588, 31 U. S. C. A. par. 452.)
>
> '*All coins and currencies* of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be *legal tender for all debts,* public and *private,* * * *' (May 12, 1933, c. 25, Title III, par. 43 (b) (1), 48 Stat. 52, as amended June 5, 1933, c. 48, par. 2, 48 Stat. 113, 31 U. S. C. A. par. 462.
>
> '* * * *Every obligation,* heretofore or *hereafter* incurred, whether or not any such provision is contained therein or made with respect thereto, *shall be discharged* upon payment, dollar for dollar, *in any coin or currency,* which at the time of payment is *legal tender for public and private debts.* * * *' (June 5, 1933, c. 48, par. 1, 48 Stat. 113, 31 U. S. C. A. par. 463.)' "

It was stipulated in the trial court (see stipulation p. 4 above) that an appeal would be taken by the party losing on the demurrer and that the appeal would "test solely the constitutionality of said Section 580a."

Freedom of contract, due process of law. (14th Amendment.)

Appellant's Reply Br., pp. 44, 45:

> "The basic error and wrong of substituting a valuation for money in payment of a debt is that the creditor who purchases at the sale must stand the loss in every instance where he is unable to resell the property at the figure the jury fixed; and he must stand the loss with no chance to recoup any part of it where a third party is the purchaser and the jury decides the public *ought*

to have paid more at such sale. The creditor must stand as a loss the difference between what the jury thinks the public *ought* to have paid and what it actually paid. These various losses under our statute are as certain to be forced on the creditor as anything can be certain. To inflict such losses on a lender of money violates first principles of right and wrong. He must bear the losses though he has committed no breach of contract, has done no wrong. This is unreasonable and inequitable and ought not to be sanctioned, even if there were no specific prohibition against it in the national Constitution, and a creditor relied only on the right to freedom of contract unhampered by *unreasonable* restrictions, as guaranteed by the 14th Amendment."

Unreasonable discrimination and Denial of equal protection of the laws. (14th Amendment.)

Appellant's Reply Brief, pp. 46, 47:

"Considering the substitution of appraisements for money separate and apart from the constitutional clause that specifically prohibits it, such scheme is cumbersome, costly, and unjust to the creditor when honest but erroneous appraisements are made. Moreover, there is no reason to believe that the plan would be accompanied with less fraud and corruption now than it was in the years prior to 1789, as described by Justices Story, Marshall and others. Yet the jury's valuation must be received in every instance by the creditor *at par;* he must accept it, 'dollar' for dollar, the state 'dollar' as the equivalent of the national dollar. The creditor holding real estate security given him by act of the debtor is not by our state statute *equal* with other creditors so far as being forced to credit only national money realized out of security, real or personal, obtained by them under other state statutes, or chattel security given by act of the party. The lender on real estate is discriminated against as to medium of payment. * * *

Wallace v. *Zinman,* 200 Cal. 585 * * *."

The final decision herein states that appellant raised both "freedom of contract guaranteed by the due process clause" and "equal protection of the laws." *

STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

The Tender Clause.

This is the *first* case ever before this Court, so far as counsel and the court below, as it states, "after its independent research," can ascertain, where the validity of any State law similar to said Section 580a, or any other appraisal or tender law, has been made a point at issue under the *tender clause* of Article I, Section 10, of the Constitution. Indeed, it appears to be the first time that the meaning and effect of the tender clause has ever been a direct issue in any reported decision of this Court.

The State court holds that the clause should be construed as if it read:

> No State shall * * * make any Thing but gold and silver Coin a Tender in Payment of *unsecured* Debts.

Although this point appears to be novel in this Court, it was heretofore decided by the Supreme Court of Missouri in accord with appellant's contention herein in *Baily* v. *Gentry*, 1 Mo. 164; 13 Amer. Dec. 484. (See opinion of Justice Cook therein.)

The history and purpose of the tender clause is summarized by Mr. Justice Story in his "Commentaries on the Constitution of the United States," Vol. 2, page 242, Secs.

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* The decision is entirely on Federal grounds, since the court construes said Section 580a to be without time limit.

1371 and 1372, quoted in full in the opinion below. It was brought about not only by the evils resulting from the promiscuous issuance of paper money, but also, as he states from "• • • laws of another character, *well known under the appellation of tender laws, appraisement laws* • • •" etc., whereby "• • • property of any sort • • • either real or personal, might be tendered by the debtor in payment of his debts • • •" *Sec. 1371* (Italics ours.) He thus summarizes its object and purpose in said Section 1372:

> "• • • Accordingly, it has been uniformly held, that the prohibition applied to all future laws on the subject of tender; and, therefore, no *State legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin.*" (Italics ours.)
>
> "The evil which produced the prohibitory clause in the Constitution of the United States, was the practice of the states of making bills of credit, and in some instances appraised property, 'a legal tender.' "
>
> *Watson, on the Constitution,* Vol. 1, page 765, quoting Madison's Writings, page 160.
>
> "Madison classified the evils to be remedied under four heads, of depreciated paper as a legal tender, of property substituted for money in payment of debt, of laws for paying debts by installments, and of the occlusions of the courts of justice."
>
> 1 *Bancroft, "History of the Formation of the Constitution of the United States,"* page 241.

See also *Ogden* v. *Saunders,* 12 Wheat. 213, Justices' opinions at pages 265, 288, 306, 328, and 336; also arguments of Daniel Webster at page 247 and Wheaton at page 216.

Examples of appraisal and tender laws which brought about the adoption of the tender clause are the South Carolina Statute of October 12, 1785, No. 1293; the Massachusetts Act of November 15, 1786 (Acts and Resolves of

Massachusetts, 1786-1787); the Virginia Law of 1782 (Hening's Laws of Virginia, Vol. XI, page 178); and the New Jersey Statute of 1786.

The said South Carolina law provided that before any lands or chattels "seized or levied upon by virtue of any decree, execution or process, * * * shall be exposed to sale," the property must be appraised by three appraisers, chosen by the parties or the local court, who shall fix such valuation as they swear is "fair and equitable;" that if the debtor upon demand of the creditor did not tender property so appraised in payment of the debt, the property so levied upon might be sold and if no bid was made equaling three-fourths of such valuation, the sale could be completed but the creditor was compelled to allow three-fourths of such valuation as a credit on the debt.

The Massachusetts tender law, *supra,* among other things, provided that "if any suit shall hereafter be commenced within this Commonwealth against any debtor, being a Citizen thereof, such debtor, * * * is hereby authorized to tender real or personal estate in full satisfaction of the debt," at a valuation to be made by three appraisers chosen by the parties and the local court.

The Missouri law, which was held to violate the tender clause in *Baily* v. *Gentry, supra,* allowed property to be applied to the discharge of debts at two-thirds of its appraised value.

Said Section 580a of the California Code of Civil Procedure is substantially similar in its requirements, operation, and effect to the laws above referred to which caused the enactment of the tender clause. Consequently, it comes within its prohibition.

There is one difference between the said South Carolina and California laws, in that under the South Carolina Act only seventy-five per cent of the official valuation of the property tendered was applied on the debt, whereas, under

the California Act one hundred per cent of the official valuation of the property must be applied on the debt. Thus, the California statute in its pertinent substance provides that whenever a "money" judgment is sought for the balance due upon an obligation for the payment of which a trust deed or mortgage with power of sale upon real property was given as security, following the exercise of such power of sale, the court shall have an appraisement of the property made, find the fair market value thereof, and "may not render judgment for more than the amount by which the debt exceeds the said market value * * *."

The conclusion is inescapable that the effect of said statute in many cases will be to prevent a creditor, lending lawful money of the United States upon condition that it be paid in full in like lawful money, from having such condition fulfilled. In other words, in all cases where the property constituting the security is sold at public sale, as required by law, for an amount less than the total due, and the court valuation is in excess thereof, said Section 580a compels him to take said valuation of property in discharge of his debt to the extent of the excess of said valuation over the actual public sale price. The result is that if he purchases the property at such sale he suffers the *pro tanto* discharge of his obligation, not in money, but in a "theoretical market value." *Birkhofer* v. *Krumm*, 27 Cal. App. (2d) 513, at 539, certiorari denied, 305 U. S. 653, 83 L. Ed. 423. If a third person buys the property, the creditor must suffer a loss of the amount by which the court's valuation exceeds the sale price. In either case, the debtor's *"pecuniary" obligation to the creditor is to that extent cancelled by something other than money!*

That the purpose and effect of said California law is to generally permit only a portion, and not the whole of an indebtedness to be repaid notwithstanding the debtor may

be wealthy and well able to pay in full, is candidly conceded by the California Court.

> "The statute (Sec. 580a) attempts to so affect the contract that only a portion of the indebtedness may be recovered * * *."

Bennett v. *Superior Court*, 5 Cal. App. (2d) 13, at 14; and this, says the court,

> "notwithstanding the borrower of the money may well be able to pay in full."

Decision Below Misconstrues Tender Clause.

The court below concedes that the tender clause was enacted to prohibit a State "from passing any statute providing, directly or indirectly, as to past or future debts, that the debtor may tender in total or partial discharge thereof property at an appraised valuation." But it attempts to avoid it by first making the novel and unprecedented assertion that the tender clause applies only to unsecured and therefore not to secured debts. The word "debts" as used in the legal tender clause is *unqualified;* it is not limited to some debts; it therefore must be taken to apply to *all* debts. Unable to find judicial precedent to support its qualification, the court below endeavors to justify its conclusion by the observation that Justice Story's discussion of the tender clause has no direct reference to debts secured by real property. But Justice Story made no distinction whatsoever between secured and unsecured debts. On the contrary, he emphasized in his Section 1372, quoted in the Opinion below, that the tender clause, together with the prohibitions as to the States coining money and emitting bills of credit "are founded upon the same general policy"; i. e., "to provide a fixed and uniform value throughout the United States, by which commercial and other dealings of the citizens, as well as the moneyed trans-

actions of the government, might be regulated," with the result that "no State legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin." The conclusion is inescapable that it was Story's view, as well as that of its authors, that the tender clause applied to all "dealings," "pecuniary contracts," and hence to all money obligations or debts.

Incidentally, the South Carolina law of 1785, hereinabove partly quoted, used the word "decree" and expressly referred to "every sale, by virtue of any decree or execution * * *." That the "decree" in said South Carolina valuation law referred to a real estate foreclosure decree, scarcely needs authority, but is certain and plain from 20 So. Car. Rep., page 80, Vol. 1 Desaus. Eq. (1, S. C. Equity), page 73, "An Act for the more speedy and effectual enforcing the execution of *decrees in the Court of Chancery.*— Passed 12th March, 1785;" and from the same volume, page 85, an Act ratified February 19, 1791, giving the Courts of Common Pleas jurisdiction in certain suits on debts secured by *real estate mortgages,* to foreclose the mortgagor by a foreclosure sale "from his equity of redemption in as complete a manner as if the same had been foreclosed in a Court of Chancery." Likewise, the Massachusetts law of 1786 expressly refers to and includes any "suit." That the word "suit" included realty mortgage suits is apparent from the Act of November 4, 1785, Massachusetts Laws (1780-1800), page 251,

> "* * * in real actions on mortgage, or bargain and sale with defeasance, the judgment shall be conditional upon payment within two months of the amount due."

Cases Cited in Opinion Not Determinative.

The court below further endeavors to justify its conclusion that Section 580a does not violate the tender clause by arguing that this Court has of late upheld similar statutes

in *Richmond Mortgage & Loan Corp* v. *Wachovia B. & T. Co.*, 300 U. S. 124, and *Honeyman* v. *Jacobs*, 306 U. S. 539, stating that they are "conclusive in the present case."

A brief but complete answer to this contention may be made in the observation that *these cases cannot be conclusive on the legal tender point because the legal tender clause was neither cited nor considered in either of those cases.* Even the court below admits this, viz:

> "It is true that they involve the contract clause and not the tender clause of the Constitution * * *."

As this question was not raised in said two cases, this Court had *no jurisdiction* there to determine it.

Southern Railway Co. v. *Kentucky*, 274 U. S. 76;
California Powder Works v. *Davis*, 151 U. S. 389, 393;
New York etc. v. *Kleinert*, 268 U. S. 646;

Not only is the *Richmond etc. Corp.* v. *Wachovia etc. Co.* case, *supra*, not in point because the tender clause was neither invoked nor passed upon, but for the further reason, as this Court therein emphasized, there was in North Carolina an alternative remedy "equally effective for the enforcement of the obligation" (P. 129), so that there was preserved to the mortgagee the right for which he had contracted, " * * * namely, *payment in full.*" (P. 130.) (Our italics.) But there is no such alternative remedy in California whereby the lender may be assured ultimate "payment in full," because under a companion statute governing foreclosure in judicial proceedings Sec. 726 Code of Civil Procedure (Chap. 793, Stats. 1933, p. 2118), the recovery is likewise limited by appraisal. This "most important difference between the situation in North Carolina and that in California" is pointed out by the California Appellate Court in *Birkhofer* v. *Krumm*, 27 Cal. App. (2d) 513, at page 539, which quotes from and distin-

guishes the said *Richmond etc. Corp.* case. Defendant Krumm therein petitioned this Court for certiorari, basing his petition on the said *Richmond* case, but the petition was denied, 305 U. S. 653; 83 L. Ed. 423.

The *Honeyman* case, *supra,* is based upon and quotes from the said *Richmond* case, but it did not consider nor decide the legal tender point. It merely held that the *contract clause* was not violated by the New York statute because it appeared as a matter of record without conflict therein that "the value of the property is equal to the debt of the plaintiff" (P. 54), so that as plaintiff received all he was entitled to under his contract it necessarily followed that he suffered no impairment of his contract.

COINAGE CLAUSE AND FEDERAL STATUTES VIOLATED.

Inherently related to and associated with the tender clause, is Section 8 of Article I of the Federal Constitution, which grants exclusively to Congress the power "to coin money, regulate its value, and of foreign coin," (Mr. Justice Washington in *Ogden* v. *Saunders,* 12 Wheaton, at page 265), and Federal statutes enacted pursuant thereto, providing what shall be a tender "in payment of *all* debts, public and private, within the United States." (R. S. par. 3588, 31 U. S. C. A. par. 452; also c. 25 Title III, par. 43 (b) (1), 48 Stat. 52, as amended June 5, 1933, c. 48, par. 2, 48 Stat. 113, 31 U. S. C. A. par. 462.)

There is also the Federal statute which expressly provides that *money obligations shall be only discharged, dollar for dollar,* with that currency which at the time is legal tender, viz:

> "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon

payment, dollar for dollar, in any coin or currency, which at the time of payment is legal tender for public and private debts * * *." (June 5, 1933, c. 48, par. 1, 48 Stat. 113, 31 U. S. C. A. par. 462.)

The National Government, then, has exclusive power to determine what shall be money, what may be loaned as money, and what may discharge an obligation to return such money borrowed; i. e., what shall be a tender in payment of such debt. A State may not directly or indirectly invade this domain with legislation such as Section 580a, which in effect substitutes property at an appraisal for money, or State valuation dollars for United States dollars.

SECTION 580a IS REPUGNANT TO THAT FREEDOM OF CONTRACT GUARANTEED BY THE XIV AMENDMENT.

A State cannot, " 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them' "

Louis K. Liggett Co. v. *Baldrige*, 278 U. S. 105;
Jay Burns Baking Co. v. *Bryan*, 264 U. S. 504, 513;
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1;
New State Ice Co. v. *Liebmann*, 285 U. S. 262;
Louis K. Liggett v. *Lee*, 288 U. S. 517.

Appellant does not question the right of the State to reasonably limit the rates of interest through usury laws; to impose statutes of limitation reducing and curtailing the time for the enforcibility of loans; to enact procedural legislation providing the manner in which loans may be enforced; to protect the borrower against over-reaching and fraud; in times of emergency so requiring, to enact *moratoria* delaying *for the period of duration of the emer-*

gency only the collectibility of loans with proper compensating provisions; and, even insolvency laws which entirely wipe out one's debts provided he turn over all of his property for ratable distribution to his creditors.

But while the State may constitutionally enact the foregoing multifarious laws of a regulatory character with respect to loans, it cannot go further and enact an *absolute prohibition* against persons contracting to loan money upon security on the condition that such loan be repaid in money. In short, it cannot constitutionally enact legislation such as Section 580a which in effect declares to a lender—"You may enter into a contract to lend another a certain amount of lawful money of the United States, but you cannot, if it is secured by a trust deed or mortgage on real estate, enforce its full collection in like lawful money of the United States." In other words, the direct effect of this statute is to prevent a person from making a contract to grant a loan in lawful money, upon condition that it be repaid in full in like lawful money.

As said by the Court in the *Fairmont Creamery Co.* case, *supra:*

> "• • • we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public."

SECTION 580a DENIES "THE EQUAL PROTECTION OF THE LAWS" PROVIDED BY THE XIV AMENDMENT.

> "It may be generally said that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances • • •."
>
> *Hartford S. B. I. Ins. Co.* v. *Harrison,* 301 U. S. 459;
>
> *Louisville Gas & E. Co.* v. *Coleman,* 277 U. S. 32.

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon *some reasonable ground,*—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."
> *Gulf, etc. Ry. Co.* v. *Ellis,* 165 U. S. 150, at 166.

In the case last cited, a Texas statute was held void which imposed an attorney's fee upon railway companies which should fail to pay certain claims within a given time. The vice of such statute as declared by this Court was that:

> "* * * the statute arbitrarily *singles out one class of debtors,* and punishes it for a failure to perform certain duties,—*duties* which are *equally obligatory* upon all debtors * * *," at 158. (Italics ours.)

Similarly, the vice of Section 580a is that it singles out one class of creditors, to wit: *secured creditors,* and punishes such class by placing an obstacle in the way of the full payment of the obligations due them which it does not impose upon *unsecured* creditors. In this respect it discriminates in favor of *unsecured* creditors and against *secured* creditors. Thus under the California law an unsecured creditor can attach and execute upon all the real property that his debtor owns, and *still have judgment for the full amount of any remaining deficiency!* (Secs. 682, 684, 692, Code of Civil Procedure.) But if a creditor obtains a mortgage or deed of trust as security for his obligation, such creditor is barred by Section 580a, regardless of the fact that his debtor may be solvent, from obtaining judgment in money for the full balance unpaid after sale of the security.

Section 580a not only discriminates in favor of wholly

unsecured creditors, but even in favor of a certain class of secured creditors, to wit: creditors who are given personal property as security. Thus creditors secured by *pledge* or *mortgage* of chattels may still foreclose and *obtain full judgment for the deficiencies.* Neither Section 580a nor any other law of California prevents such collection in full in money.

There is no reasonable ground for such discrimination. As said in the decision of this Court last quoted, the ultimate duties of the borrowers in each case, whether real, personal or no property is given as security, are "duties which are equally obligatory upon all debtors * * *"; namely, the repayment in full of each loan upon maturity in United States lawful money. Correspondingly, the rights of all classes of lenders in this respect are fundamentally the same; that is to say, irrespective of the character of security which lenders may receive, *all* are equally entitled to the full payment of their loans.

As was pointed out by Daniel Webster in his argument in *Ogden* v. *Saunders,* 12 Wheat. 213, at 247, one of the principal reasons for the writing of the Constitution was to eradicate a vicious system of paper money and tender laws which "threatened to beggar every man of property, and ultimately to ruin the country. * * *" He further declared:

> "* * * The relation between debtor and creditor, always delicate, and always dangerous, whenever it divides society, and draws out the respective parties into different ranks and classes, was in such a condition in the years 1787, '88 and '89, as to threaten the overthrow of all government; and a revolution was menaced, much more critical and alarming than that through which the country had recently passed. The object of the new Constitution was to arrest these evils; to awaken industry, by giving security to prop-

erty; to establish confidence, credit and commerce, by salutary laws, to be enforced by the power of the whole community."

The opinion below quotes Justice Story as authority for the well recognized historical fact that the tender and appraisal legislation during and following the Revolutionary War was productive of much fraud, chicanery, and profligacy. If this was true then of laws which permitted debtors to cheat their creditors; which excused borrowers from repaying their lenders; which invited false appraisals and perjured valuations; it is equally true now with respect to Section 580a which is substantially similar to those original appraisal statutes. That such legislation is an invitation to and productive of perjured appraisals is established not only by the experience of the past, but of the present as well. Any legislation which in effect tells people they need not keep their promises or perform their obligations is bound to have a baneful effect on public morality.

In conclusion, it is submitted that the grounds of appeal are substantial, particularly in view of the absence of decisions of this Court upon the tender clause. But it also appears to be a case of transcending importance, not merely because the statute questioned affects the sum of one and a half billion dollars loaned in California upon real estate (Reports of Federal Reserve Bank of San Francisco, and of the California Building and Loan and Insurance Commissioners), and, as a precedent, possibly thirty-five billion dollars throughout the nation ("The Internal Debts of the United States," Clark, page 5 *et seq.*), but because the statute challenged represents the invasion of a State into and encroachment upon that exclusive domain of the national government with respect to the medium of payment and discharge of all pecuniary obligations.

The opinion of the District Court of Appeal for the First Appellate District appears at page 1 of the statement opposing jurisdiction and motion to dismiss or affirm.

Respectfully submitted,

JOHN H. RIORDAN,
CHARLES HILL WHITE,
Attorneys for Appellant.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,
Appellant,
vs.
J. ALICE STELLING,
Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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In the Supreme Court
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OCTOBER TERM, 1940

No.

W. J. KIRKPATRICK,
Appellant,
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Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

PREFATORY STATEMENT.

The "Jurisdictional Statement" filed by appellant herein pursuant to Rule 12 of this Court shows that this case is one technically within the requirements of Section 237 (a) of the Judicial Code. The validity of the state statute, Section 580a of the California Code of Civil Procedure, was challenged in the state Courts under specific provisions of the federal Constitution and statutes, as set forth in said "Statement". The validity of said statute was sustained against that

attack. Appellant raises questions which are questions of first impression and which are new. There appears to be no prior decision of this Supreme Court upon the subject. The federal questions involved are substantial, and are of serious and widespread public importance, as shown by the "Jurisdictional Statement".

JURISDICTION TACITLY CONCEDED BY APPELLEE.

Appellee moves to dismiss this appeal for want of jurisdiction because, as she asserts in the first paragraph of her motion, the decree appealed from is that of the District Court of Appeal of the State of California. If appellee's contention is that there may not be an appeal from any state Court, it is a complete answer thereto merely to cite said Section 237 (a) of the Judicial Code. But if appellee means that the decision herein is not a final decision, because the Supreme Court of California is the highest Court in California, and the decision is not by that Court, the contention is without merit, for the reason that the record in two places (see Typewritten Record herein, p. 10, lines 22 and 23, and p. 61), shows that the Supreme Court of California denied a hearing herein. Therefore, under the cases cited (R. p. 10, lines 26 and 27), the decision herein of the District Court of Appeal became a final decision sixty days after its rendition, from which an appeal lies to this Court within three months thereafter. An additional apt authority on this point is

Terry v. Southern Pacific, 176 Cal. 184.

However, appellee in the second paragraph of her motion exhibits a waning confidence in said point and appears to tacitly admit this Court has jurisdiction hereof, stating:

> "* * * *although the record in the said cause may show that this Court has jurisdiction* in the premises yet it is manifest that said appeal is without merit * * *" (Our emphasis.)

APPELLEE FAILS TO NEGATIVE APPELLANT'S CONTENTION THAT THIS IS A CASE OF FIRST IMPRESSION IN THIS COURT.

If the points raised by appellant herein, particularly with respect to the meaning and effect of the tender clause set forth in Article I, Section 10, of the federal Constitution, had heretofore been decided by this Court, and if appellee could point out some prior decision upon the subject adjudicating it adversely to appellant herein, appellee's statement would be of some assistance to this Court and perhaps aid it in disposing of this case. But appellee has utterly failed to do this, although challenged by appellant at the very outset of his "Jurisdictional Statement", with the result that the only decision that appellee is able to cite upon this subject is that of the state Court below which is herein appealed from, and consequently not determinative. Indeed, that the point made by the appellant under the tender clause herein is undecided by this Court, is conceded by the learned author of the opinion of the Court below, viz.:

> "* * * It is true that we have been referred to no case in a state or federal court, and independent research has disclosed none, that directly passes on the question as to whether such legislation violates the tender clause."
>
> *Kirkpatrick v. Stelling,* now officially reported, 36 Cal. App. (2d) 658, at 671.

The only case wherein a tender and appraisal statute has been assailed under the tender clause is that of *Baily v. Gentry,* 1 Mo. 164, 13 Amer. Dec. 484, and it is important here to emphasize that the Missouri tender law was there held repugnant to the tender clause of the federal Constitution.

THE DECISION OF THE COURT BELOW IS NO ANSWER TO APPELLANT'S CONTENTIONS.

Appellee's statement of grounds making against the jurisdiction of this Court is substantially nothing but a verbatim copy of the opinion of the Court below. But the opinion does not even discuss the following federal points raised by appellant to the effect that Section 580a is repugnant to:

1. The grant to Congress of *power* to determine what shall be money and what shall pay money obligations, debts. (R. p. 13, lines 5 and 6.) See, also, Assignment of Error No. 3. (R. p. 2, lines 2 to 5.)

2. The federal statutes enacted pursuant to that grant of power and providing what shall pay money obligations; what shall be a tender "in payment of *all*

debts, public and private, within the United States". (R. p. 13, lines 8 to 24.) Assignment of Error No. 4. (R. p. 2, lines 6 to 15.)

3. The grant, those federal statutes, the tender prohibition, and the other two prohibitions, in association and combination, establishing a national policy of exclusive authority over the medium for paying *all* debts within the United States (R. p. 13, lines 2 to 7), and Story, Sec. 1372, quoted in opinion; Assignment of Error No. 7. (R. p. 3, lines 4 to 8.)

Let us note what Justice Washington in *Ogden v. Saunders,* 12 Wheat., p. 265, states is obvious in this regard:

> "* * * It declares, that 'no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts'. These prohibitions, associated with the powers granted to Congress 'to coin money, and to regulate the value thereof, and of foreign coin', *most obviously* constitute members of the same family, being upon the *same subject,* and governed by the same policy." (Our italics.)

Accordingly, the grant to Congress of the power to issue money and make it a tender in payment of all debts within the United States, and the statutes so providing, are violated by said Section 580a; and that is true even if there were no tender prohibition on the states. The point is stated by Madison in the Federalist, No. 44:

> "The *power* to make anything but gold and silver a *tender in payment of debts,* is withdrawn

> from the states on the *same principle* with that of issuing *paper currency.*" (Our italics.)

The national government, then, has *power* to provide, and *has* provided, what shall be the medium or tender for the payment of all debts, existing and future, secured or unsecured, within the United States. The states have no power to provide what may be a tender or medium for paying any debt, existing or future, secured or unsecured, within the United States.

The opinion below, however, does discuss the points raised by appellant under the tender clause and XIV Amendment at quite some length. But it is respectfully asserted that it does not answer these contentions. Thus while *the opinion below expressly recognizes that the tender clause is broad enough to invalidate state statutes which require the discharge, even in part, of unsecured obligations through the medium of Court, jury, or other official appraisals* (*Kirkpatrick v. Stelling,* 36 Cal. App. (2d) at 665), it holds that the tender clause can have no such force or effect where such legislation is made to apply only to secured debts; e.g., debts secured by real property. In short, the opinion below is the first instance, covering a period of a century and a half, so far as research of counsel for the parties discloses, wherein any Court has held that the tender clause is limited, in its application, to *unsecured* obligations! It thus appears that the Court below for the first time in the constitutional history of this country has written into the tender clause of

the federal Constitution a drastic limitation upon its application and effect which is unsupported by either the text of the clause itself, or the decisions of this Court.

Thus, the opinion below interpolates into the tender clause the word "unsecured" before the word "debts". That is contrary to the definition of debts, as understood both when the Constitution was written and today:

> "*Debts.* A sum of money due by certain and express agreement. 3 Bl. Com. 154." (Bouvier.)

The decision is also contrary to the following principles announced in *Home B. & L. v. Blaisdell,* 209 U. S. at p. 426:

> "When the provisions of the Constitution, in grant or restriction, are specific, so particularized as *not to admit of construction,* no question is presented. Thus emergency would not * * * permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts'. But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause." (Our italics.)

and *United States v. Sprague,* 282 U. S. 716 at p. 731, 75 L. ed. 640 at p. 644:

> "The Constitution was written to be understood by the voters; its words and phrases were used in

> their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for *construction* and no excuse for *interpolation* or addition." (Our italics.)

To further sustain its conclusion on the applicability of the tender clause, the Court below primarily relied upon three cases, to-wit:

> *Richmond Mortgage & Loan Corp. v. Wachovia B. & T. Co.*, 300 U. S. 124;
> *Honeyman v. Jacobs*, 306 U. S. 539;
> *Suring State Bank v. Giese*, 246 N. W. 556.

But it should be a complete answer to point out that in none of these cases was the tender clause cited or considered, and that consequently none of these cases are decisive upon the tender clause point raised in the instant case. The *Wachovia* and *Honeyman* cases involved the *contract clause*—not the tender clause, nor any of the other five clauses involved herein.

Even the *Suring State Bank* case did not attempt to hold that a state could force a discharge of a pecuniary obligation by something other than money, such as property or a valuation upon property. It merely recognized an old procedure often exercised by a Court of Equity in foreclosures, whereby the Court, prior to a foreclosure sale, fixed a minimum price as a condition to confirmation of the sale. The decision there did not compel the creditor to accept the minimum price so fixed as a payment in full of his obligation. On the

very contrary, it *reversed* the judgment of the lower Court because it purported to do so.

THE ONLY FEDERAL CASE CITED BY APPELLEE SUPPORTS APPELLANT.

Appellee in her statement has cited but two cases in addition to quoting the opinion below, to-wit:

Helvering v. Midland Mutual Life Ins. Co., 300 U. S. 216;

Suring State Bank v. Giese, 246 N. W. 556.

Appellant has just pointed out that the *Suring State Bank* case did not involve the tender clause and the other clauses involved herein; is not in point; and, indeed, reversed the judgment of the lower Court in so far as it attempted to compel a creditor to accept less than was due him, without his consent.

In *Helvering v. Midland Mutual Life Ins. Co.*, supra, this Court did not hold, as appellee appears to infer, that where property is bid in or purchased at a foreclosure sale by a creditor, on the one hand, or a stranger, on the other, at a figure less than the full amount due on the debt, the full obligation is discharged by such partial payment. On the contrary, this Court declared through Mr. Justice Brandeis:

> "If the bid had been insufficient to yield full payment of the mortgage debt, principal and interest, *the company would have been entitled to a judgment for the deficiency.*" (p. 226.) (Our italics.)

Furthermore, this Court in that case established the very proposition for which appellant contends—and which, practically speaking, is the crux of this case—that *the actual amount bid or paid* at a foreclosure sale *rather than a theoretical market value obtained by appraisal,* is the only amount which *is* paid upon the obligation, and consequently the figure which should govern. Said the Court there:

> "At best, evidence of value is largely a matter of opinion, especially as to real estate." (p. 225.)

Citing:

Montana Ry. Co. v. Warren, 137 U. S. 348, 353.

CONCLUSION.

That the contentions of appellant herein are not fantastic is evidenced, among other things, by the fact that the Supreme Court of Missouri upheld a similar contention under the tender clause in *Baily v. Gentry,* supra, and that the Court below devoted many pages to its consideration and treatment of certain of appellant's contentions.

It would seem clear that an appeal lies herein; that the grounds are substantial and important; that Congress, within the limits of the Constitution, has, and should have, exclusive legislative power over money and the medium for paying all debts; and that, in the words of Justice Story,

"* * * no state legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin." (Sec. 1372.)

It is respectfully submitted that the Court has jurisdiction in the case, and the motion to dismiss or affirm should be denied.

Dated, San Francisco, California,
July 3, 1940.

JOHN H. RIORDAN,
CHARLES H. WHITE,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,

Appellant,

vs.

J. ALICE STELLING.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

OWEN D. RICHARDSON,
ARTHUR G. SHOUP,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,

Appellant,

vs.

J. ALICE STELLING.

Appellee.

TYPEWRITTEN STATEMENT PURSUANT TO RULE 12, PARAGRAPH 3, DISCLOSING MATTER OR GROUND MAKING AGAINST THE JURISDICTION OF THIS COURT ASSERTED BY THE APPELLANT.

I.

The opinion of the District Court of Appeal of the State of California in and for the First Appellate District, Division One, answers all of the Appellant's Contentions.

The District Court of Appeal, First Appellate District, Division One, rendered, through Presiding Justice Peters, an opinion which we here reproduce. 100 Cal. App. Dec., 535; 98 Pac., (2d) 566; 36 Cal. App. Rep. 2nd, p. 658. It is as follows:

"PETERS, *Presiding Justice:*

"Plaintiff, as assignee of a promissory note secured by a deed of trust on certain real property, brings this action against defendant for the deficiency alleged to be due after default and a sale of the real property constituting the security. The note and deed of trust were executed on July 7, 1934. The note was in the sum of $45,925, and was payable one year from date "in lawful money of the United States of America." The complaint alleges that the security for the note was duly sold on January 8, 1938 (whether appellant or a third person was the purchaser does not appear), and that the net proceeds of the sale were applied on the note; that after the proceeds of the sale were so applied there remained, and still remains, due a balance of $13,164.13, for which judgment is sought. The complaint does not allege that the property constituting the security was sold for its fair market value as of the day of sale, or what such fair market value was on that date. Defendant demurred to the amended complaint on the ground, among others, that the complaint fails to contain the allegations required of Section 580a of the Code of Civil Procedure as enacted in 1933 (St. 1933, p. 1672, § 4) and as in force in 1934 when the note and deed of trust were executed, and as in force in 1935 when the note became due. The plaintiff contended such section was unconstitutional. Defendant waived the other grounds of her demurrer, and both parties stipulated that the question of the constitutionality of Section 580a would be the sole ground urged on appeal. The trial court held the statute constitutional, and accordingly sustained the demurrer without leave to amend. After judgment was entered for the defendant plaintiff prosecuted this appeal.

Section 580a of the Code of Civil Procedure, which defendant contends is unconstitutional, was added to that

code in the legislative session of 1933, and became effective in that year. The statute requires that, in actions for deficiency judgments after sale under a power of sale in a deed of trust or mortgage, the plaintiff must set forth in his complaint the amount of the entire indebtedness, the amount for which the property was sold, "and the fair market value thereof at the date of sale." The section further provides that, upon the application of either party made at least ten days before trial, the court shall, and at any time upon its own motion may, appoint an inheritance tax appraiser to appraise the property; that such appraisal shall be admissible in evidence, and the appraiser may be called and examined as a witness by either party or by the court; that before the court shall render any judgment in the action the court shall find the fair market value of the real property at the time of sale; that the court "may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale."

It has been uniformly held by the courts of this State that Section 580a cannot lawfully be applied to any mortgage or deed of trust executed prior to its passage, whether the sale took place before or after the passage of the statute, because, to so apply it, would be to impair the obligation of the contract in violation of the Federal Constitution (U. S. C. A. Const. Art. 1, §10). *Bennett* v. *Superior Court*, 5 Cal. App. 2d 13, 42 P. 2d. 80; *Central Bank of Oakland* v. *Proctor*, 5 Cal. 2d 237, 54 P. 2d 718; *Bank of America Nat. Trust & Savings Ass'n* v. *Dennison*, 8 Cal. App. 2d 173, 47 P. 2d 296; *Bechtel* v. *Nelson*, 10 Cal. App. 2d 66, 51 P. 2d 99; *Smith* v. *Davis*, 10 Cal. App. 2d 487, 52 P. 2d. 515; *Rosenberg* v. *Janssen*, 11 Cal. App. 2d 15, 52 P. 2d 952, 54 P. 2d 721; *Brikhofer* v. *Krumm*, 27 Cal. App. 2d 513, 81 P. 2d

609; *Bank of America Nat. Trust & Savings Ass'n* v. *Burg Bros.*, 31 Cal. App. 2d 352, 88 P. 2d 196; *Drapeau* v. *Smith*, Cal. App., 93 P. 2d 157. None of these cases passed upon the constitutionality of the statute as applied to transactions entered into after its passage.

(1) Appellant contends that, as to its prospective operation, Section 580a of the Code of Civil Procedure violates Article I, Section 10 of the Federal Constitution, U. S. C. A., which provides in part as follows: "No State shall * * * make any Thing but gold and silver Coin a Tender in Payment of Debts * * * ". It is the theory of appellant that Section 580a of the Code of Civil Procedure brings about, in its operation, the substitution of property at a valuation in place of money in payment of a lawful debt, and that this violates the above-quoted provision of the Federal Constitution. To illustrate appellant's argument: If a debtor owes $20,000, and the land given as security is sold, after default, for $5,000, and the trial court determines the fair market value at the time of sale was $12,000, the lender, under Section 580a, is permitted to recover only $8,000 as a deficiency. Under such circumstances according to appellant, the lender is being compelled, by force of the statute, to accept in payment of his debt, $5,000, in cash received at the sale, *$7,000 in appraised value*, and an $8,000 deficiency judgment. It is urged that the operation and effect of such a statute is to substitute an appraised valuation for money. It is contended that the very purpose of the Federal constitutional provision above quoted was to prevent any State from passing any statute that would compel a creditor to accept property at an appraised figure in lieu of money in payment of debts. On this point appellant has filed an interesting, exhaustive and scholarly brief, discussing, at length, the situation that existed prior to the adoption of the Federal Constitution, and the evils that were intended to be remedied not only by the tender

clause above quoted, but also the companion clause in the same section prohibiting any State from coining money or emitting bills of credit. It appears, therefrom, beyond doubt, that, after the Revolution, and prior to the adoption of the Federal Constitution, economic chaos was threatened, not only because of the issuance of worthless paper money by some of the States, but because many of the States passed special laws on behalf of the debtors that practically wiped out existing debts. By some of these laws the due payment of debts was suspended; existing debts in direct violation of the terms of the contract, by statutory mandate, were permitted to be paid in instalments; and by other statutes debtors were permitted to tender to the creditor property of any sort in payment of the debts, or the creditor was compelled to take property of the debtor seized in execution at an appraised figure. Typical of these statutes is one passed in Virginia in 1782 (Hening's Laws of Virginia, vol. XI, p. 178) providing in substance that whenever a creditor secured a judgment against his debtor, the latter may "tender to the creditor, or his attorney, lands in discharge of the said judgment" at an appraised figure fixed as provided in the statute. The same statute permitted judgments to be satisfied in whole or in part by the tender of slaves appraised as set forth in the statute. Other laws permitted tobacco, hemp and flour to be tendered in payment of judgments. A South Carolina statute of 1785, referred to in the briefs, permitted the debtor in the action brought to collect a debt, to tender any property in payment of said debt at three-quarters of its appraised value.

Mr. Justice Story, in his "Commentaries on the Constitution of the United States," volume 2, page 242, sections 1371 and 1372, discusses the matter as follows:

> "Sec. 1371. The next prohibition is that no State shall 'make anything but gold and silver coin a tender

in payment of debts'. This clause was manifestly founded in the same general policy which procured the adoption of the preceding clause. The history, indeed, of the various laws which were passed by the States in their colonial and independent character upon this subject, is startling at once to our morals, to our patriotism, and to our sense of justice. Not only was paper-money issued, and declared to be a tender in payment of debts; but laws of another character, well known under the appellation of tender laws, appraisement laws, instalment laws, and suspension laws were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless either real or personal, might be tendered by the debtor in payment of his debts; and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value. Such grievances and oppressions, and others of a like nature, were the ordinary results of legislation during the revolutionary war and the intermediate period down to the formation of the Constitution. They entailed the most enormous evils on the county; and introduced a system of fraud, chicanery, and profligacy, which destroyed all private confidence, and all industry and enterprise.

"Sec. 1372. It is manifest, that all these prohibitory clauses, as to coining money, emitting bills of credit, and tendering anything but gold and silver in payment of debts, are founded upon the same general policy, and result from the same general considerations. The policy is, to provide a fixed and uniform value throughout the United States, by which commercial and other dealings of the citizens, as well as the moneyed transactions of the government, might be regulated. For it may well be asked, why vest in Congress the power to establish a uniform standard of value, if the States

might use the same means, and thus defeat the uniformity of the standard, and consequently the standard itself? And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of State tender laws? All these prohibitions are, therefore, entirely homogenous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts. For this reason, as well as others derived from the phraseology employed, the prohibition of State tender laws will admit of no construction confining it to State laws which have a retrospective operation. Accordingly, it has been uniformly held, that the prohibition applies to all future laws on the subject of tender; and, therefore, no State legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin."

It is to be noted that the statutes above referred to, and Mr. Justice Story's discussion above quoted, have no direct reference to debt secured by a real property mortgage or deed of trust. The arguments of appellant are fundamentally unsound in that they fail to give due weight to the fact that Section 580a of the Code of Civil Procedure deals not with debts generally, but with a specialized transaction—a debt secured by a mortgage or deed of trust. We have no doubt that under the tender clause of the Federal Constitution a state is prohibited from passing any statute providing, directly or indirectly, as to past or future debts, that the debtor may tender in total or partial discharge thereof property at an appraised valuation. But this is not the legal effect of Section 580a. When a lending agency determines to lend money on the security of a specific parcel of real property, it is told by the statutes of California that in case of default, before it can secure a personal judgment against the borrower, it must first

exhaust its security. Sec. 726, Code Civ. Proc. This it may do, in either of two ways—it may foreclose (and this is so whether the security transaction takes the form of a mortgage or deed of trust—Sections 725a, 726, Code Civ. Proc.) or it may sell under the power of sale in the mortgage or deed of trust. Before the lending agency makes the loan, it sees and evaluates the property itself. That valuation is made by itself, at any figure it may determine. It is under no compulsion to lend any sum, and it, in its uncontrolled discretion, determines what value it will place on the property. Immediately upon the loan being made the lender secures a lien on that specific property—a lien which no act the borrower can legally affect. This is a fundamental distinction between the type of statute that the tender clause prohibits and statutes of the nature of section 580a of the Code of Civil Procedure. It is one thing for a state by statute to provide that either as to past or future debts, in case of default, the creditor must accept property at a court appraisal in payment of the debt—property in which the creditor has no rights, legal or equitable, until he attaches or executes—property which the debtor may have when the loan is made, but which he may sell, transfer, or encumber before the debt falls due—and quite another to tell the lending agency by statute at the time that it makes the loan, that its primary security is a specific parcel of land which it may evaluate at any figure it may see fit, and that if, in the case of default, it desires to realize on the security by sale (or foreclosure as will later appear) it must secure at private or judicial sale the fair market value of the security, and if it does not its recovery in a personal action will be measured accordingly. Such a statute, in our opinion, is not a tender law at all, and is clearly not within the purview of the tender clause.

(2-4) In this State, as already pointed out, there can be but one action to recover a debt secured by a mortgage or deed of trust. The land is deemed to be the primary security. If the remedy of foreclosure is sought the land becomes the principal debtor and the borrower becomes the surety. *Woodward* v. *Brown*, 119 Cal. 283, 51, P. 2, 542, 63 Am. St. Rep. 108. The history of the law of mortgages demonstrates that equity has always extended its protective arm over foreclosure proceedings to protect, if necessary, the rights of the borrower. It has always been held that the foreclosure of mortgages (and the same rule obviously applies to foreclosure of deeds of trust) is a matter of purely equitable cognizance and that the controversy must be settled on equitable principles. 18 Cal. Jur., p. 276, Sec. 561.

This discussion of foreclosures is pertinent here. If the appellant herein, instead of selling under the deed of trust, had elected to foreclose the deed of trust as provided by section 725a of the Code of Civil Procedure (St. 1933, p. 1673, §7), added to that code at the same legislative session at which Section 580a was adopted, then appellant would have been subjected to the provisions of Section 726 of the Code of Civil Procedure regulating foreclosures, which section was also amended in 1933 (St. 1933, p. 2118). As so amended, that section provides that in the foreclosure action the decree shall establish the amount of the deficiency, if any; that the plaintiff in the foreclosure action, within three months of the date of the foreclosure sale may petition the court; that upon such petition the court shall take evidence of the fair market value of the property sold as of the date of sale; that the court shall find on this issue and render its money judgment against the defendant borrower "for the amount by which the amount of the indebtedness with interest and costs of sale

and of action exceeds the fair value of the property • • • as of the date of sale." St. 1937, p. 770. The section also provides that upon application of either party, or upon its own motion, the trial court may appoint an inheritance tax appraiser to appraise the property as of the date of sale and such report shall be admissible in evidence, but not conclusive, on this issue. This section, as amended in 1933, has been upheld even as to its retroactive operation in so far as it deals with the foreclosure of deeds of trust. *Miller* v. *Hart*, 11 Cal. 2d 739, 81 P. 2d 923. It should be mentioned that one of the briefs in that case contended the section violates the tender clause, but apparently the Supreme Court did not consider the point even worthy of mention.

(5, 6) It is thus seen that, had the appellant herein pursued the alternative remedy of foreclosure, he would have been subjected to exactly the same restrictions as to the amount of the deficiency judgment as are provided by Section 580a of the Code of Civil Procedure. This is of considerable importance. Section 726 of the Code of Civil Procedure is clearly valid. What this State has done, by the adoption of Sections 580a and 726, is to declare that property sold for a debt secured by a mortgage or deed of trust, whether sold in a foreclosure proceeding or under a power of sale, must be sold for the fair market value. The State has also declared that if the creditor either buys in the property himself or sells to a third person at a figure less than the fair market value, he has participated in a sale, to the detriment of the debtor, that is unfair and unconscionable, and he must bear the consequences. It may be assumed that the legislature in passing such statutes had certain abuses in mind that the statutes were intended to remedy. In fact we are permitted to take judicial notice of the fact that in 1933, when these statutes were enacted, and prior and subsequent thereto,

the market for real estate had almost entirely disappeared. Under such circumstances we are clearly of the opinion that, since under a contract of mortgage or deed of trust, the creditor agrees to look to the land as his principal debtor, and to the borrower merely as surety, that the state has the power to declare that the land can only be sold for the fair market value, and that the surety can only be held for the difference between the fair market value and the amount of the indebtedness. If Sections 580a and 726 were to be given retroactive effect so as to apply to mortgages and deeds of trust executed prior to their passage in 1933, there might be some merit in appellant's contentions, but here the appellant knew when the loan was made that in case of default, if he desired to secure a personal judgment against the creditor, he must sell at the fair market value.

Equity courts have gone far, in the exercise of their inherent and broad powers, and independently of statute, to protect the rights of all concerned in foreclosure proceedings. In *Suring State Bank* v. *Giese,* 210 Wis. 489, 246 N. W. 556, 85 A. L. R. 1477, the supreme court of Wisconsin affirmed a lower court decree confirming a sale of the property on the express condition that plaintiff be not entitled to a deficiency judgment at all—a decree which goes far beyond Section 580a of the Code of Civil Procedure. In so doing the Wisconsin supreme court pointed out that the economic depression had practically wiped out the real estate market; that because of that fact the device of a judicial sale had failed of its intended purpose of securing the fair value of the property at such sale, and stated, 246 N. W. at page 557: "• • • and the question arises whether a court of equity is wholly impotent to rise to the needs of justice and see that the parties are fairly and properly protected." The court pointed out that equity courts possess the inherent power

to adopt any one of three measures to protect all concerned:

1. The court may decline to confirm the sale where the bid is substantially inadequate.

2. The court, in ordering a sale, may, in its discretion, take notice of the present emergency, and, after a proper hearing, fix a minimum or upset price at which the premises must be bid if the sale is to be approved.

3. The court may conduct a hearing, after sale, if it has not theretofore fixed an upset price, and establish the value of the property, and, 246 N. W. at page 558: "* * * as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation." There is an exhaustive annotation on this case in 85 A. L. R. 1480, supplemented by an annotation in 89 A. L. R. 1087; related points are discussed in 90 A. L. R. 1330; 94 A. L. R. 1352; 108 A. L. R. 891; 115 A. L. R. 435. Under the Wisconsin case, and the authorities discussed in the various annotations referred to, *supra*, Section 726 of the Code of Civil Procedure merely puts into statutory form a power the court inherently possessed. By Section 580a of the Code of Civil Procedure the Legislature has merely carried over to sales under a power contained in a deed of trust or mortgage the same restrictions that are provided in the case of foreclosure actions.

It should also be mentioned that the United States Supreme Court has upheld, even as to its retroactive operation, a statute, in many respects, similar to Section 580a of the Code of Civil Procedure. In *Richmond Mtg. & L. Corp.* v. *Wachovia B. & T. Co.*, 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886, the court had under consideration a North Carolina statute which provided that whenever a sale is had of mortgaged property, and the

mortgagee becomes the purchaser, and thereafter the mortgagee seeks to secure a deficiency judgment, the mortgagor may show as a matter of defense that the property sold was fairly worth the amount of the debt, or that the amount bid was substantially less than the true value, and, upon such showing, may defeat any deficiency judgment against him, in whole or in part. The United States Supreme Court, in upholding the statute retroactively as against the contention that the statute impaired the obligation of contracts, stated in part, 300 U. S. at page 130, 57 S. Ct. at page 340, 81 L. Ed. 552, 108 A. L. R. 886: "The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due. By the old and well-known remedy of foreclosure a mortgagee was so limited because of the chancellor's control of the proceedings." The court goes on to point out that foreclosure has been the classical method of realizing upon the mortgage security, and then continues, 300 U. S. at page 131, 57 S. Ct. at page 340, 81 L. Ed. 552, 108 A. L. R. 886: "If, therefore, *the Legislature of the state had elected altogether to abolish the remedy by trustee's sale,* we could not say that it had not left the mortgagee an adequate remedy for the enforcement of his contract. But the Legislature has by no means gone so far. The law has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract." (Italics ours.)

In *Honeyman* v. *Jacobs,* 306 U. S. 539, 59 S. Ct. 702, 83 L. Ed. 972, decided in April of 1939, the United States Supreme Court reaffirmed the *Richmond Mortgage Cor-*

poration case, *supra*. In the *Honeyman* case the court had under consideration the validity, retroactively, of Section 1083a of the New York Practice Act. That statute is substantially similar to Section 580a of the California Code of Civil Procedure, and, apparently, is not limited, as was the North Carolina statute to cases where the mortgagee becomes the purchaser at the sale. The court held the statute was valid retroactively as against the argument that it violated the contract clause. In so holding the court pointed out that the mortgage debt was $15,000; that the property was sold for $7,500; that with interest and expenses the mortgagee was attempting to collect a deficiency of over $9,500; that the trial court found that the property was actually worth more than $25,000. The court stated, 59 S. Ct. at page 703: "The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit. Having a total debt of $15,771.17, with expenses, etc., of $1,319.03; appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over $25,000. He has that in hand. We know of no principle which entitles him to receive anything more. Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there *was any constitutional sanction for such a provision which precluded the Legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt.*" (Italics ours.)

These cases, in our opinion, are conclusive in the present case. It is true that they involved the contract clause and not the tender clause of the Constitution, but it is also true that the reasoning therein contained is equally applicable

to the tender clause. If the tender clause is applicable both cases were decided incorrectly. If the tender clause was applicable we do not think the United States Supreme Court would have overlooked that fact.

(7) On the authority of the above cases, and upon the reasoning above set forth, we hold that Section 580a of the Code of Civil Procedure is not violative of the tender clause of the United States Constitution; that that clause merely compels the creditor to sell at the fair market value, and if he does not, limits his recovery accordingly; that such provision is in accord with the principles of equity governing foreclosure sales; that the statute is not a tender statute at all.

(8) Appellant emphasizes that some, but not all, of the cases referred to in the above annotations are justified on the theory that they dealt with emergency legislation, and that Section 580a as enacted in 1933 and reenacted in 1935 does not purport to be emergency legislation. The exact theory of appellant on this point is not clear. Emergencies do not create power, although they may offer the excuse for its exercise. *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481. Appellant's major argument is that the section violates the tender clause of the Federal Constitution. If that section prohibits legislation of the type of Section 580a (which, as we have seen, it does not) it would prohibit it whether or not an emergency existed. There is no express or implied exception in this constitutional provision.

Appellant contends that no state from 1789 to the start of the last depression attempted to pass legislation of the type exemplified by Section 580a, and contends that this indicates that the prohibition is so clear that no State, until recently, dared to pass such legislation. Whether it is true that no State has passed such legislation in the period in question we do not know. To search all the statutes of all

the States for that period of nearly a hundred and fifty years would be an intolerable, if not an impossible, task. It is true that we have been referred to no case in a State or Federal court, and independent research has disclosed none, that directly passes on the question as to whether such legislation violates the tender clause. So far as mortgage legislation comparable to Section 580a is concerned, it could be argued that if various States have passed such legislation, that it so clearly does not violate the tender clause that no one has seen fit until now to challenge such legislation on that ground. Either inference is possible. Neither inference has any legal effect on the actual question to be decided in this opinion. Whether any State has seen fit to pass such legislation in the past is a false quantity. Whether they have or not, the above cases and annotations indicate that for many years equity courts, regardless of statutes, have exercised comparable powers in foreclosure proceedings. These cases demonstrate beyond question that the principles stated in Sections 580a and 726 of the Code of Civil Procedure are not something new and novel, but are the statutory statement of equitable principles that have been recognized and enforced since the adoption of the Constitution.

(9-11) Appellant, supported by *amicus curiae*, next urges that Section 580a of the Code of Civil Procedure is unconstitutional because it unnecessarily interferes with the freedom of contract guaranteed by the due process clause, arguing, in this regard, that while the State has the right to regulate the collection of loans, it has no constitutional right to prohibit the collection in full of loans. It is also urged that the section denies "equal protection of the laws" because it discriminates against creditors secured by real property, in favor of unsecured creditors or creditors secured by personal property.

These contentions require but little attention in view of

the discussion herein contained concerning the first point. As already pointed out, all Section 580a of the Code of Civil Procedure, and the related Section 726, do, is to tell the prospective lender that in cases of loans on real property hereafter made by you, in case of default by the borrower, you can sell the security, but you must sell at a fair sale—you must see to it, as a matter of fair play, in order to protect the borrower, that you receive or pay the fair market value of the property, and if you do not, your recovery will be limited accordingly. So understood, the section in question does not prohibit the "full" collections of loans or in any other way interfere with the freedom of contract guaranteed by the due process clause. As already held, all Section 580a does is to carry over to sales of property under a power of sale in a deed of trust or mortgage those equitable principles that many courts have held have always existed in foreclosure proceedings.

The contention that the section discriminates against creditors whose debts are secured by real property is obviously without merit. Real property mortgages and deeds of trust have always been considered, and properly so, as a proper subject of classification. That such classification is reasonable is too obvious to require discussion.

(12) In a supplemental brief filed by appellant it is urged that when Section 580a of the Code of Civil Procedure was enacted in 1933, it was made self-limiting for a period of a little over three years; that the note and deed of trust here involved were executed on July 7, 1934; that the 1933 statute, including its self-limiting provision, became part of the note and deed of trust; that the statute expired in September 1936; that the sale took place in January, 1938; that at that time, but for its re-enactment in 1935, Section 580a as enacted in 1933 would have been nonexistent and appellant would have had all the rights and remedies that existed prior to its adoption. Based on these premises, it

is urged that the 1933 statute cannot be applied to this transaction because it had expired; and that the 1935 reenactment cannot be applied to notes and deeds of trust executed in 1934, because to do so would be to give the 1935 statute a retroactive effect, which, it has been held, in the many cases cited earlier in this opinion, cannot be done.

To this argument there are at least two complete answers. In the first place, Section 580a of the Code of Civil Procedure as enacted in 1933, in our opinion, was not limited as to time. That section was part of a statute adding several new sections to and amending various other sections of the Civil Code and Code of Civil Procedure. (Stats. 1933, p. 1669, Chap. 642.) The statute has nine separate distinct and wholly self-sufficient sections. Each section of the act, with the exception of Section 9, either amends some section of the codes, or adds a new section thereto. Section 9 is the severability section. Section 4 is the section that provides for the addition of Section 580a to the Code of Civil Procedure. In that section nothing is said as to any limitation of time—as there added to the Code of Civil Procedure the section is not limited as to time. Section 8 adds Section 2924½ to the Civil Code. At the end of that section, without a new paragraph, and with nothing to indicate that the sentence applies to any other section but Section 8, appears this sentence: "This act and the provisions of this section shall be effective to and until September 1, 1936." In spite of the use of the word "act" in this sentence, the only reasonable conclusion is that the time limitation was intended to apply only to Section 2924½ of the Civil Code. This is the normal interpretation of Section 8. If the Legislature had intended the time limitation contained in the last sentence of that section to be applicable to all of the preceding seven sections, it would normally have added a separate section of the statute so declaring.

At least it would have set the sentence forth in a separate paragraph.

Apparently the Legislature of 1935 had some doubts on the matter. Accordingly, they caused to be reenacted the seven sections that had been amended or added in 1933 (Stats. 1935, p. 1802, Chap. 650), but they did not reenact Section 2924½ of the Civil Code that contained the time-limitation clause thus clearly indicating that in 1933 they had intended only Section 2924½ of the Civil Code to be limited as to time, and that as to the other seven sections, including Section 580a of the Code of Civil Procedure, no limitation was intended. Section 580a of the Code of Civil Procedure was expressly "reenacted" in 1935. Sec. 4, Stats. 1935, p. 1805, Chap. 650. By Section 9 of the 1935 act the Legislature declared: "It is the intent of this act to reenact Sections 2924, 2924b and 2924c of the Civil Code and Sections 580a, 580b, 580c and 725a of the Code of Civil Procedure in order to continue the same in effect subsequent to September 1, 1936, *and remove any ambiguity created by the language of Section* 2924½ *of the Civil Code as added by an act approved June* 2, 1933, *as to the time said sections shall be effective.* It is intended that sections * * * 580a * * * of the Code of Civil Procedure shall be effective without any time limitation thereon." (Italics ours.) From this review of the situation it seems clear that the Legislature of 1935 "reenacted" Section 580a simply out of an abundance of caution. Such reenactment, in our opinion, was unnecessary. The 1933 statute, in so far as it enacted Section 580a, was not limited as to time.

(13) There is another answer to appellant's contention even though it be admitted that Section 580a as passed in 1933 was operative only until September 1, 1936. Although the provisions of Section 580a appertain to the remedy, in the many cases holding the section not retroactive already

cited in this opinion, it was held that its provisions affected the substantial rights of the contracting parties to such a degree that to apply the statute to mortgages and deeds of trust executed prior to its passage would impair the obligation of contracts. This holding is fatal to appellant's present contention. When this deed of trust and note were executed in 1934, the provisions of Section 580a became an integral part of the contract the same as if written therein. By that section appellant's rights were limited. The fact the statute was to become inoperative in 1936 could in no way affect the contractual rights of respondent. If Section 8 of the 1933 statute above quoted is given its broadest possible meaning, the legal effect would simply be that as to all mortgages and deeds of trust executed between the effective date of Section 580a in 1933, and September 1, 1936, regardless of when the sale was held, the rights of the parties were to be measured by the statute as it existed at the time the mortgage or deed of trust and note were executed. There is no warrant for the interpretation that, if the sale were to be held after September 1, 1936, the old law should be applicable. Such an interpretation would make the substantial rights of the respondent dependent on the mere whim or caprice of appellant. Here the note was executed and fell due prior to 1936. The rights of the parties must, therefore, be governed by the 1933 statute.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: WARD, J.; GOODELL, *Justice pro tem.*"

II.

Some additional observations regarding appellant's contention that Cal. Code of Civil Procedure 580a, herein attacked, is violative of the tender clause of the U. S. Constitution (Art. I, Sec. 10).

The contention of the appellant that Section 580a of the California Code of Civil Procedure (v. quotation in the Opinion, *supra*) compels a beneficiary under a trust deed to accept property in lieu of money is, to the mind of the writer, little short of fantastic. He receives money if the property is purchased at the trustee's sale by a third person; he receives a credit on his debt if he himself makes the purchase; that is, he really pays himself if he is the successful bidder.

In *Helvering* v. *Midland Mutual Life Ins. Co.*, 300 U. S. 216, 224; 81 L. Ed., at p. 612,

this Court speaking through Mr. Justice Brandeis, said: "• • • where the stranger makes the purchase the debt is discharged by a payment in cash; where the mortgagee purchases the property the debt is discharged by means of a credit." And this is about all that need be said as to the mode and manner of payment to a beneficiary or a mortgagee.

The construction contended for by appellant contemplates the throwing overboard of the age old equitable doctrine for the protection of the trustor or mortgagor in the sale of real property which is security for a debt, namely: (1) Refusal to confirm the sale where the bid is substantially inadequate; (2) Fixing a minimum or upset price at which the premises must be bid in; (3) As a condition of confirmation require that the fair value of the property be credited upon the foreclosure judgment.

Suring State Bank v. *Giese, et al.*, 210 Wis., 489; 246 N. W., 556; 85 A. L. R., 1477.

III.

Conclusion.

It is most respectfully and earnestly urged that the instant appeal presents no question invoking the jurisdiction of this Court.

Respectfully submitted,

OWEN D. RICHARDSON,
Counsel for Appellee,
42-D South First Street,
San Jose, California.

Dated: June 18, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,

Appellant,

vs.

J. ALICE STELLING,

Appellee.

MOTION TO DISMISS OR TO AFFIRM.

Comes now the appellee, by her counsel appearing in that behalf, and moves the court to dismiss the appeal in the above-entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the District Court of Appeal of one of the United States, to wit, the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

And the said appellee, by Counsel as aforesaid, also moves the court to affirm the said judgment or decree from which said appeal purports to have been taken, because, although the record in the said cause may show that this Court has jurisdiction in the premises yet it is manifest that said appeal is without merit and the questions on which the deci-

sion of the cause depends are so unsubstantial as not to need further argument.

Dated: June 18, 1940.

ARTHUR G. SHOUP,
OWEN D. RICHARDSON,
Counsel for Appellee for the purposes of these motions.
Address: 42-D South First Street, San Jose, California.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,
Appellant,

vs.

J. ALICE STELLING,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Counsel for Appellant and Petitioner.

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2. The opinion of the court below strikes from the tender prohibtion one-half its force by holding in effect that it means: "No state shall make anything but gold and silver coin a tender in payment of unsecured debts." This new and extraordinary interpretation alone justifies a hearing on this very important federal question.. 7

3. Congress has power to make, and has made, national money the exclusive medium for paying all unsecured and secured debts. The state statute attacked herein provides that "when a money judgment is sought" for the balance due after a trustee's sale, a valuation of the real estate may be substituted for money in paying or cancelling that obligation to pay money, the conflict is plain 8

4. This constitutional plan of making debts payable only with money is the honest and just plan and until now has never been departed from since the Constitution was adopted. The use of local valuations as a substitute for money in paying debts always has and always will cause immense and unjustifiable losses. The contest herein is: National sovereignty vs. state sovereignty as to the medium for paying future debts.. 9

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W. J. KIRKPATRICK,
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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

GROUNDS OF PETITION.

Comes now the above named Appellant, and presents this, his Petition for a Rehearing of the above entitled cause, and in support thereof respectfully shows:

1. That neither of the two authorities cited in the Order Granting the Motion to Dismiss and Dismissing the Appeal is pertinent.

2. The opinion of the Court below strikes from the tender prohibition one-half its force by holding, in effect, that it means: "No state shall make anything but gold and silver coin a tender in payment of unsecured debts." This new and extraordinary interpretation alone justifies a hearing on this very important federal question.

3. Congress has power to make, and has made, national money the exclusive medium for paying all unsecured and secured debts. The state statute attacked herein provides that "When a money judgment is sought" for the balance due after a trustee's sale, a valuation of the real estate may be substituted for money in paying or cancelling that obligation to pay money. The conflict is plain.

4. This constitutional plan of making debts payable only with money is the honest and just plan and until now has never been departed from since the Constitution was adopted. The use of local valuations as a substitute for money in paying debts always has and always will cause immense and unjustifiable losses. The contest herein is: National sovereignty vs. state sovereignty as to the medium for paying future debts.

ARGUMENT.

1. THAT NEITHER OF THE TWO AUTHORITIES CITED IN THE ORDER GRANTING THE MOTION TO DISMISS AND DISMISSING THE APPEAL IS PERTINENT.

There are but two authorities cited by the Court in its Order Granting the Motion to Dismiss, etc.,

to wit: *Honeyman v. Jacobs,* 306 U. S. 539, and *Richmond Mortgage & Loan Corp. v. Wachovia B. & T. Co.,* 300 U. S. 124. What was the sole point involved in these cases? The Chief Justice answers this question as to the first case in the very first sentence of the Opinion therein, viz.:

> "This case, coming here on appeal from the state court, presents the question of the validity under the *contract clause* of the Federal Constitution of Sec. 1083-a of the Civil Practice Act of New York. * * *." (Italics ours throughout.)
>
> *Honeyman v. Jacobs,* 306 U. S. 539 at 540.

Mr. Justice Roberts answers this question, as to the said second case cited, in the first sentence of the Opinion, viz.:

> "This is an appeal from a judgment of the Supreme Court of North Carolina sustaining the validity of a statute *claimed to impair the obligation of a contract,* * * *."
>
> *Richmond Mortgage & Loan Corporation v. Wachovia B. & T. Co.,* 300 U. S. 124 at 126.

The conclusion is inescapable from the language quoted from said two cases that the sole point involved, considered, and decided was the *contract clause* of the Federal Constitution!

The contract clause is not involved in the instant case. At no time did appellant contend that Section 580a of the California Code of Civil Procedure violated the contract clause.

Appellant did and does claim that said Section 580a violates the *legal tender clause* of Article I, Section 10, of the Federal Constitution.

The tender prohibition on the states is of a very different nature from the contract clause and was inserted for very different reasons. This Court in *Home B. & L. Assn. v. Blaisdell,* 290 U. S. at 426, speaking through Chief Justice Hughes, states that the tender prohibition is of the same nature as the prohibition against state coinage of metals into money and that the contract clause is of a different nature and meaning.

Madison in the Federalist, No. 44, stated the same thing:

> "The power to make anything but gold and silver a tender in payment of debts, is withdrawn from the states on the same principle with that of issuing paper currency."

The contract clause is *not* an absolute prohibition like those clauses and has nothing to do with *medium* of payment. Elliot's Debates, Vol. 5, p. 485. There is a far larger and different question involved herein than impairing a contract, namely, whether, in the face of this tender prohibition (and other clauses later discussed discussed) the forty-eight states may provide that as to future debts local valuations may be a 100% substitute for money by a *solvent* or insolvent debtor in paying such debts during *good* times and bad where real estate was theretofore given by the debtor as security for such loans. The *Honeyman* and *Wachovia* cases cannot be determinative of that point, for, as declared in *Dewey v. Des Moines,* 173 U. S. 193 at 200:

> "* * * A point that was never raised cannot be said to have been decided adversely to a party

who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of."

Webster well stated what is involved herein in *Ogden v. Saunders,* 12 Wheat. at pp. 247, 248, 251: (And all seven Justices in five written opinions agreed with him, *Ibid.* 265, 288, 306, 328, 329, 336.)

"* * * Commerce, credit and confidence, were the principal things which did not exist under the old confederation, and which it was a main object of the present Constitution to create and establish. *A vicious system of legislation, a system of paper-money and tender laws, had completely paralyzed industry,* threatened to beggar every man of property, and ultimately to ruin the country. * * * The object of the new Constitution was to arrest these evils; to awaken industry, by giving security to property; to establish confidence, credit and commerce, by salutary laws, to be enforced by the power of the whole community."

* * * * * * *

"* * * One of the first powers given to Congress, therefore, is that of coining money, and fixing the value of foreign coins; and one of the first restraints imposed on the states, is the total prohibition to coin money. These two provisions are industriously followed up and completed, by denying to the states *all* power of emitting bills of credit, or of making anything but gold and silver a tender in the payment of debts. The *whole* control, therefore, over the standard of

value, and *medium of payments,* is vested in the general government."

* * * * * * *

"* * * Can a state make anything but gold and silver a *tender* in payment of *future debts? This nobody pretends.*"

The enduring reasons making valuations a bad substitute for money include the following: Self-interest of the local valuers or valuer, local pressure on them, prejudice against the local or distant creditor, and perjury as to valuations. This Court protects the national government against this very thing. Thus in *Helvering v. Midland Mutual Life Ins. Co.,* 300 U. S. 216, the Court denied the right of the mortgagee to prove values of the real estate he purchased at foreclosures, his contention being he paid too much for them. This Court there said:

"The administration of the income tax law would be seriously burdened if it were held that when a mortgagee bids in the property for a sum including unpaid interest, he may not be taxed on the interest received except upon an inquiry into the probable *fair market value* of the property. *'At best, evidence of value is largely a matter of opinion, especially as to real estate.' Montana R. Co. v. Warren,* 137 U. S. 348, 353, 34 L. ed. 681, 11 S. Ct. 96."

2. THE OPINION OF THE COURT BELOW STRIKES FROM THE TENDER PROHIBITION ONE-HALF ITS FORCE BY HOLDING IN EFFECT THAT IT MEANS: "NO STATE SHALL MAKE ANYTHING BUT GOLD AND SILVER COIN A TENDER IN PAYMENT OF UNSECURED DEBTS." THIS NEW AND EXTRAORDINARY INTERPRETATION ALONE JUSTIFIES A HEARING ON THIS VERY IMPORTANT FEDERAL QUESTION.

The lower Court in effect construed the tender prohibition to mean nothing more than the following:

> "No state shall make anything but gold and silver coin a tender in payment of *unsecured* debts."

Never before has there been such an interpretation. This takes from the prohibition more than one-half its force. Private debts secured by mortgage are the largest class of private debts in the United States. (Clark, on *The Internal Debts of the United States* (20th Century Fund, 1933), pp. 5, 6.)

This case, involving the tender clause, is the counterpart of the famous cases, *Craig v. Missouri,* 4 Pet. 410, 7 L. ed. 903, and *Briscoe v. Kentucky,* 11 Pet. 257, 9 L. ed. 709, involving the *twin* prohibition against state paper money.

Congress may not authorize a state to issue state paper money for any purpose, nor may it authorize a state to provide that valuations of local property may be used to pay debts because, as Madison pointed out, it has no power to do so.

State paper currency issued by a legislature as a substitute for national money and based on something of value, and valuations made in local courts, based on real estate, and likewise used as *a substi-*

tute for national money in discharging an obligation to pay money, are obviously of the same essence, are both bad substitutes for money. This is the reason the framers of the Constitution voted unanimously to make all valuation laws void equally with state coinage laws and state paper money laws. (Elliot's Debates, Vol. 5, 484.)

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3. **CONGRESS HAS POWER TO MAKE, AND HAS MADE, NATIONAL MONEY THE EXCLUSIVE MEDIUM FOR PAYING ALL UNSECURED AND SECURED DEBTS. THE STATE STATUTE ATTACKED HEREIN PROVIDES THAT "WHEN A MONEY JUDGMENT IS SOUGHT" FOR THE BALANCE DUE AFTER A TRUSTEE'S SALE, A VALUATION OF THE REAL ESTATE MAY BE SUBSTITUTED FOR MONEY IN PAYING OR CANCELLING THAT OBLIGATION TO PAY MONEY. THE CONFLICT IS PLAIN.**

> "By the Constitution of the United States, the several states are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. *But no intention can be inferred from this to deny to Congress either of these powers.*" (Juilliard v. Greenman, 110 U. S. 421, at p. 446, 28 L. ed. 204, at p. 214.)

The national government, that case also holds, has *exclusive* power to coin metals into money, issue paper money, and make this national money a tender in payment of *all* debts in the United States. Nothing is anywhere said there or elsewhere that such money is merely for payment of all unsecured debts in the United States. Thus, when Congress passes money laws, it frequently adopts the wording of the tender

prohibition and provides what may be a tender "in payment of *all* debts, public and private, within the United States." (Jur. St. p. 7.) The legal tender cases and the gold clause cases (*Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 79 L. ed. 885) likewise declare that this national power over the *medium* of payment of debts excludes the acts of individuals and states from modifying or limiting that power in any way. This principle applies to a debt secured by *mortgage. Guaranty Trust Co. v. Henwood,* 307 U. S. 247, 83 L. ed. 1266. All this is merely what Story said, that the three money prohibitions were to give the national government this exclusive power (Section 1372, quoted by the lower Court herein), what Webster said, *supra,* and what is universally recognized. This is a clear, additional reason why a hearing on the merits should be granted herein. Confusion and conflict now exist.

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4. **THIS CONSTITUTIONAL PLAN OF MAKING DEBTS PAYABLE ONLY WITH MONEY IS THE HONEST AND JUST PLAN AND UNTIL NOW HAS NEVER BEEN DEPARTED FROM SINCE THE CONSTITUTION WAS ADOPTED. THE USE OF LOCAL VALUATIONS AS A SUBSTITUTE FOR MONEY IN PAYING DEBTS ALWAYS HAS AND ALWAYS WILL CAUSE IMMENSE AND UNJUSTIFIABLE LOSSES. THE CONTEST HEREIN IS: NATIONAL SOVEREIGNTY vs. STATE SOVEREIGNTY AS TO THE MEDIUM FOR PAYING FUTURE DEBTS.**

The constitutional plan is an honest and just plan; the valuation plan is the opposite. The defaulting mortgagor may be adequately protected not only by confirmation of sale procedure, which this Court in the *Wachovia* case held was *"fair to both parties,"*

but by four other classes of state laws: Redemption laws, moratorium laws, upset price procedure, and other state laws providing that if the mortgagee is the purchaser he must credit on the unpaid balance of the debt any profit he makes by reselling the property.

"Debts and taxes must be paid with the *substance* and not the shadow," wrote Washington to Madison in 1786*, stating that it was these substitutions of valuations for money that were "extremely hurtful and among the principal sources of the evils and corruption of the present day." Madison, answering that letter and agreeing with Washington on that point**, stated also that he had just opposed and helped defeat a proposed Virginia valuation law "for making property a tender in payment of debts at four-fifths its value." Valuations made in local courts and used as money to pay debts always have been, and it is fair to say always will be, grossly unjust. The contest herein is: National sovereignty vs. state sovereignty, as to the medium for paying future debts.

CONCLUSION.

As this appeal does *not* involve the *contract clause*, but does involve the construction and effect of the tender and money clauses of the Federal Constitution and its application to a state statute upon a point which has never been passed upon or decided by this

*Bancroft, *History of the Formation of the Constitution of the United States*, Vol. 1, 239.
**Writings of James Madison* (Hunt's Edition), Vol. II, p. 301.

Court, it is sincerely urged that Appellant is entitled under Section 237(a) of the Judicial Code to, and should be granted, a hearing upon the merits.

Dated, San Francisco, California,
November 4, 1940.

Respectfully submitted,
JOHN H. RIORDAN,
CHARLES H. WHITE,
Counsel for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition is presented in good faith and without intent to hinder or delay the progress of the above entitled proceeding.

Dated, San Francisco, California,
November 4, 1940.

JOHN H. RIORDAN,
CHARLES H. WHITE,
Counsel for Appellant and Petitioner.

No. 222. KIRKPATRICK *v.* STELLING. Appeal from the District Court of Appeal, 1st Appellate District, of California. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Honeyman* v. *Jacobs*, 306 U. S. 539; *Richmond Mortgage Corporation* v. *Wachovia Bank Co.*, 300 U. S. 124. *Mr. John H. Riordan* for appellant. *Mr. Arthur G. Shoup* for appellee. Reported below: 36 Cal. App. 2d 658; 98 P. 2d 566.